NO. 84-1443

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THOMPSON BUILDING MATERIALS INCORPORATED, a California corporation,
Petitioner,

v.

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Does the ruling below--which correctly rejects an employer's various constitutional challenges to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act, and is consistent with the decisions of this Court and the Courts of Appeal--require review by this Court?

2. Where Congress has chosen to apply the Multiemployer Pension Plan Amendments Act to both voluntary and involuntary employer withdrawals from multiemployer pension plans, did the court below correctly decline to exempt involuntary withdrawals from the statute?[1]

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1 The parties are set forth in the title; respondent Board of Trustees of the Western Conference of Teamsters Pension Trust Fund is the sponsor of a multiemployer pension plan as defined in section 4001 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1301).

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No. 84-1443

In the Supreme Court of the

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October Term, 1984

THOMPSON BUILDING MATERIALS INCORPORATED, a California corporation,

Petitioner,

vs.

BOARD OF TRUSTEES OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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PRELIMINARY STATEMENT

Petitioner has not set forth a single ground for granting of certiorari which merits serious consideration by this Court. In rejecting petitioner's

constitutional challenges to the Multi-employer Pension Plan Amendments Act ("MPPAA"; 94 Stat. 1208), the decision below is consistent with a recent decision of this Court and numerous decisions of the Courts of Appeals. Moreover, the Court of Appeals correctly held that MPPAA applies to petitioner's allegedly "involuntary withdrawal" from a pension plan: Congress has already chosen to apply MPPAA to such withdrawals, and the courts below properly declined to read an exception into the statute, as petitioner now urges. There is no need for review by this Court.

STATEMENT OF THE CASE

Petitioner's statement of the facts is incomplete. The relevant facts, which are summarized in the opinion of the Court of Appeals, are as follows:

Enacted in 1974, the Employee Retirement Income Security Act ("ERISA") established a system of insurance to protect employees' interests in pension benefits in the event that their pension plan failed or was terminated with insufficient funds (Pet.Appx., p. 49). ERISA established the Pension Benefit Guaranty Corporation ("PBGC") to administer the insurance program, which is funded by premium payments from the pension plans (Pet.Appx., p. 49).

As originally enacted, ERISA allowed the PBGC to exercise its discretion in guaranteeing pension benefits in multiemployer plans (Pet.Appx., pp. 49-50). If a plan terminated, employers who had previously withdrawn from the plan incurred liability to the PBGC if certain contingencies were met: If the PBGC decided to pay the employees, each employer who had contributed to the

plan during the five-year period preceding the termination would be liable for its proportionate share, up to 30 percent of the employer's net worth (Pet.Appx., p. 50).

In 1980, Congress enacted MPPAA in response to a comprehensive report by the PBGC which demonstrated "that ERISA in its original form 'threaten[ed] the survival of multiemployer plans by exacerbating the problems of financially weak plans and encouraging employer withdrawals from and termination of plans in financial distress'" (Pet.Appx., p. 63). MPPAA changed the liability of employers who withdraw from multiemployer plans (Pet.Appx., p. 51). MPPAA requires withdrawing employers to pay the fund a proportionate share of the fund's "unfunded vested benefit liability," a measure of the shortfall in the fund's assets (Pet.Appx., p. 51). The unfunded

vested benefit liability is the difference between a pension fund's assets and the actuarial present cash value of the benefits that have vested (Pet.Appx., p. 51).

When an employer withdraws, the plan's trustees have initial responsibility to calculate the employer's withdrawal liability under one of the several different methods specified by MPPAA (Pet.Appx., pp. 51-52). If the employer disputes either the fact or the amount of liability, it has the right to request reconsideration of the matter by the plan's trustees (29 U.S.C. § 1399(b)(2)(A)); if the employer is not satisfied with the trustees' response, either party has the right to invoke arbitration (29 U.S.C. § 1401(a); Pet. Appx., p. 52). Either party to arbitration may apply to a district court "to enforce, vacate, or modify the arbitrator's

award"; in any such proceeding the arbitrator's findings of fact are presumed correct unless rebutted by a clear preponderance of the evidence (29 U.S.C. § 1401(b) & (c); Pet.Appx., p. 52-53).

In this case, petitioner challenges the constitutionality of MPPAA's withdrawal liability provisions (Pet.Appx., p. 54). Petitioner had been a participating employer in the Western Conference of Teamsters Pension Plan (the "Plan") until its withdrawal from the Plan on December 2, 1980, when petitioner ceased its contributions to the Plan (Pet.Appx., p. 53).

Respondent Board of Trustees of the Western Conference of Teamsters Pension Trust Fund ("Trust Fund"), the sponsor of the Plan, notified petitioner that petitioner was liable for

$103,156.53 in withdrawal liability, its portion of the Plan's unfunded vested benefit liability (Pet.Appx., p. 54). Petitioner did not request a reconsideration by the Trust Fund of its calculation, nor did petitioner take the other steps required to initiate arbitration under MPPAA (Pet.Appx., p. 54). Petitioner also failed to pay its withdrawal liability (Pet.Appx., p. 54).

The Trust Fund brought an action in the district court to collect the amounts owing (Pet.Appx., p. 54). The district court granted the Trust Fund summary judgment (Pet.Appx., p. 54). The Court of Appeals affirmed, rejecting petitioners' various constitutional challenges to MPPAA (Pet.Appx., pp. 55-84) and noting that several other circuits have upheld MPPAA against similar constitutional attacks (Pet.Appx., p. 57). The Court of Appeals also

rejected petitioner's argument that an exception should be read into MPPAA for employers whose withdrawal from a plan is "involuntary" or caused by union action (Pet.Appx., pp. 56-57).

ARGUMENT

The crux of petitioner's position before the Court of Appeals was that MPPAA violates the due process clause of the Fifth Amendment by impermissibly impairing contractual obligations (Pet.Appx., pp. 58-69). But this Court's recent decision in Pension Ben. Guar. Corp. v. R. A. Gray & Co. (1984) ___ U.S. ___, 104 S.Ct. 2709 squarely rejects this argument: Even where applied retroactively, the withdrawal liability provision of MPPAA "is supported by a rational legislative purpose, and therefore withstands attack under the

Due Process Clause of the Fifth Amendment" (104 S.Ct. 2720).

In urging this Court to review again the constitutionality of MPPAA, petitioner now relies upon a grab-bag of other constitutional theories--ranging from an alleged "right to a preseizure hearing" to a "right to access to the courts." In rejecting each of petitioner's theories, the decision below was entirely consistent with this Court's decisions and those of the Courts of Appeals. All of petitioner's arguments challenging the constitutionality of MPPAA have been rejected by every Court of Appeals decision reaching the merits of those issues (The Washington Star Co. v. Intern. Typo. U. N. Pen. Plan (D.C.Cir. 1984) 729 F.2d 1502; Textile Workers Pension v. Standard Dye & Finishing (2 Cir. 1984) 725 F.2d 843, certiorari denied (1984) 104 S.Ct. 3554;

Peick v. Pension Ben. Guar. Corp. (7 Cir. 1983) 724 F.2d 1247, certiorari denied (1984) 104 S.Ct. 3554; Republic Industries v. Teamsters Joint Council (4 Cir. 1983) 718 F.2d 628, certiorari denied (1984) 104 S.Ct. 3553). Contrary to petitioner's erroneous assertion, the First Circuit has not found any portion of MPPAA to be unconstitutional (see Pet., pp. 12-13). In fact, the First Circuit, sitting en banc, has vacated the portion of an opinion by one of its panels that had found one provision of MPPAA to be unconstitutional (Keith Fulton & Sons v. New England Teamsters (1 Cir. 1984) 741 F.2d 451, vacated in part (1 Cir. Oct. 22, 1984), reheard en banc (1 Cir. Dec. 5, 1984); see Appendix hereto).

In asking this Court to exempt "involuntary" withdrawals from the coverage of MPPAA, petitioner is request-

ing this Court to adopt an exemption which Congress has already considered and rejected (Pet.Appx., p. 86). Petitioner concedes that Congress "chose to ignore the problem" (Pet., p. 10) of involuntary withdrawals; more accurately, Congress simply deferred making any decision to exempt involuntary withdrawals, pending a study by the PBGC (Pet.Appx., p. 86). The Court of Appeals properly held that "Congress' decision to study the problem before legislating appears reasonable. We decline to read an exception into the statute" (Pet.Appx., p. 89).

I. THE RULING BELOW, WHICH REJECTS PETITIONER'S VARIOUS CONSTITUTIONAL CHALLENGES TO THE WITHDRAWAL LIABILITY PROVISIONS OF THE MULTI-EMPLOYER PENSION PLAN AMENDMENTS ACT, IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

Petitioner's argument that it has been deprived of property without a preseizure hearing (Pet., pp. 4-7) is based on the erroneous assertion that petitioner "sustain[ed] a loss of his property" without a prior opportunity to be heard (Pet., p. 5). But, as the Court of Appeals noted, "on the record before us Thompson has not been deprived of any property" (Pet.Appx., p. 73). No property petitioner has been "seized"; the fact that the trustees commenced proceedings to collect the withdrawal liability does not, by itself, constitute a seizure or a

deprivation of property that would require a prior hearing (New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co. (1978) 439 U.S. 96, 104-105). Petitioner has had an ample opportunity to contest its liability by requesting reconsideration by the trustees, initiating arbitration, or seeking review by the courts; petitioner "has been afforded all the process to which it was due" (Pet.Appx., p. 74; accord, Textile Workers Pension Fund v. Standard Dye & Finishing Co. (2 Cir. 1984) 725 F.2d 843, 854, certiorari denied (1984) 104 S.Ct. 3554; Republic Industries v. Teamsters Joint Council (4 Cir. 1983) 718 F.2d 628, 642, certiorari denied (1984) 104 S.Ct. 3553).

Petitioner also contends that MPPAA deprives petitioner of an impartial tribunal by giving the plan's trustees the initial responsibility to calculate the employer's withdrawal liability

(Pet., pp. 7-8).[2] Petitioner fails to come to grips with the fact that the trustees' functions are ministerial and that the method of computing liability is carefully prescribed by MPPAA (Pet.Appx., pp. 70-71). Moreover, the Court of Appeals pointed out, the trustees have natural incentives to act neutrally and reasonably in assessing withdrawal liability (Pet.Appx., p. 40; accord, The Washington Star Co. v. Intern. Typo. U. N. Pen. Plan (D.C.Cir. 1984) 729 F.2d 1502, 1511; Republic Industries v. Teamsters Joint Council (4 Cir. 1983) 718 F.2d 628, 640-641 certiorari denied (1984) 104 S.Ct. 3553).

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2 Contrary to petitioner's suggestion (Pet., p. 7), the trustees do not serve as arbitrators during the arbitration proceedings; they merely make the initial calculation of the Fund's claim prior to any arbitration (29 U.S.C. § 1382).

Contrary to petitioner's erroneous assertion, there is no conflict among the circuits on this point. The First Circuit opinion referred to by petitioner (Keith Fulton & Sons v. New England Teamsters (1 Cir. 1984) 741 F.2d 451) has been vacated in pertinent part and reheard en banc. The First Circuit expressly vacated that portion of the panel's opinion that dealt with the issue raised by petitioner--the constitutionality of MPPAA's provisions concerning the calculation by the trustees of the amount of withdrawal liability (29 U.S.C. § 1401(a)(3); see Appendix hereto).[3]

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3 Interestingly, the First Circuit did not vacate the portions of the panel decision that had rejected the employer's constitutional challenges similar to those raised by petitioner--substantive due process, seventh amendment, right to access to the courts, taking of property, and deprivation of property without a prompt hearing.

There is no basis for petitioner's contention (Pet., pp. 10-11) that MPPAA, by requiring withdrawal liability disputes to be presented initially to arbitrators, denies employers access to the courts. At most, petitioner quarrels with the timing of its access to the courts; it is beyond dispute that MPPAA expressly provides for judicial review by the district court of any arbitration award (29 U.S.C. § 1401(b)(2)). The Court of Appeals properly held that MPPAA's "reservation to the court to decide de novo all issues of law and to review factual findings for a clear preponderance of the evidence 'provide[s] for the appropriate exercise of the judicial function' by an article III tribunal" (Pet.Appx., pp. 81-82; accord, Republic Industries v. Teamsters Joint Council (4 Cir. 1983) 718 F.2d 628, 640; Textile Workers Pension Fund v. Standard

Dye & Finishing (2 Cir. 1984) 725 F.2d 843, 855, certiorari denied (1984) 104 S.Ct. 3554; Peick v. Pension Ben. Guar. Corp. (7 Cir. 1983) 724 F.2d 1247, 1277, certiorari denied (1984) 104 S.Ct. 3554).

Finally, in rejecting petitioner's argument that MPPAA effects a taking without compensation, the Court of Appeals correctly held that nothing "prohibit[s] Congress from readjusting the contractual relationships of private parties" (Pet.Appx., p. 82) and that "employers' contractual disclaimers of pension fund liability were not protected by the takings clause" (Pet.Appx., p. 84). In requiring withdrawing employers to pay their fair share of the unfunded vested benefit liability (which results from the shortfall of employer contributions), MPPAA is simply "adjusting the benefits and burdens of economic

life to promote the common good" (Penn Central Transp. Co. v. New York City (1978) 438 U.S. 104, 124); indeed, MPPAA forces employers to bear a burden which is rightfully theirs (Republic Industries v. Teamsters Joint Council (4 Cir. 1983) 718 F.2d 628, 642-643, certiorari denied (1984) 104 S.Ct. 3553; accord, Peick v. Pension Ben. Guar. Corp. (7 Cir. 1983) 724 F.2d 1247, 1276, certiorari denied (1984) 104 S.Ct. 3554).

II. THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT APPLIES TO BOTH VOLUNTARY AND INVOLUNTARY WITHDRAWALS FROM MULTIEMPLOYER PENSION PLANS.

There is no need for this Court to consider whether "an exception to liability under [MPPAA] should be recognized where an employer's withdrawal from the plan was involuntary" (Pet., p. 8),

because Congress has already considered and declined to adopt such an exception. Congress considered the possibility of adopting special rules in cases of "involuntary" withdrawals caused by union action, but, according to petitioner, Congress "chose to ignore the problem" (Pet., p. 10). In fact, Congress chose to treat involuntary and voluntary withdrawals the same under MPPAA; it directed the PBGC to conduct a study of the matter, thus postponing indefinitely any consideration of exempting involuntary withdrawals (Pet.Appx., p. 86). Congress' refusal to exempt involuntary withdrawals from MPPAA is entirely consistent with the purposes of the statute--to protect pension plans from the adverse financial impact of employer withdrawals, whether voluntary or involuntary (Pet.Appx., p. 87).

In any event, this is not a case where an employer "was victimized" by a union's withdrawal "as a deliberate tactic to impose withdrawal liability on an employer" (Pet., pp. 9-10).[4] The record does not show why the union withdrew because petitioner made no attempt in the district court proceedings to allege or show that the union's

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4 Indeed, petitioner's representations to the Court of Appeals suggest that petitioner's withdrawal was not even "involuntary." Petitioner argued below that it had entered into a binding agreement with the union to withdraw from the plan on September 26, 1980 (Notice of Motion and Motion to Remand (9 Cir. Sept. 28, 1984) p. 4). Petitioner's counsel stated that petitioner elected to make its own unilateral decision to cease making contributions to the plan:

> Once the impasse was reached on said date, I told the union negotiators that certain unilateral changes would be instituted one of which was the complete and permanent cessa-

(Footnote Continued)

withdrawal was improperly motivated (Pet.Appx., pp. 84-85). That issue is simply not presented by this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(Footnote Continued)

tion of future contributions into the Pension Trust Fund" (Declaration of Herbert A. Moss (9 Cir. Oct. 1, 1984)).

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1804

KEITH FULTON & SONS, INC.,
Plaintiff, Appellant,

v.

NEW ENGLAND TEAMSTERS AND TRUCKING
INDUSTRY PENSION FUND, ET AL.,
Defendants, Appellees.

Before
Campbell, Chief Judge,
Coffin, Bownes and Breyer, Circuit Judges.

ORDER
Entered October 22, 1984

Appellees' petition for rehearing en banc and the suggestion for rehearing en banc filed by intervenor Pension Benefit Guaranty Corporation are allowed. Since rehearing is requested, and is allowed, only with respect to the issue of the constitutionality of 29 U.S.C. § 1401(a)(3), the panel's judgment is vacated only with respect to that issue.

Argument will be heard during the December 1984 session. The case will stand on the briefs and memoranda filed to date (including the submissions of the Pension Benefit Guaranty Corporation), except that the appellant, the appellees and the intervenor may each file a supplemental brief not to exceed 20 pages not later than November 19, 1984. Counsel for the Pension Benefit Guaranty Corporation may participate in oral argument, but if so, appellees' time will be correspondingly reduced so that the time available to appellant will be equal to that of both appellees and intervenor.

By the Court,

[Francis P. Scigliano]

Clerk.